REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 37 OF 2017

CHARLES MBARIA KAIMURU.....1ST PLAINTIFF/APPLICANT

DANIEL GITHIOMI MBARIA.....2ND PLAINTIFF/APPLICANT

VERSUS

JOHN RUARA GACHERU.....1ST DEFENDANT /RESPONDENT

MURANG'A COUNTY GOVERNMENT.....INTERESTED PARTY/2ND RESPONDENT

RULING

1. The Applicants filed a Notice of Motion on the 29/8/18 seeking the reinstatement of the suit dismissed on the 1/2/18. The application is based on the grounds that the Plaintiff's Advocate inadvertently failed to attend Court due to an oversight in diarizing the matter in his chambers. That the same was only discovered when their client called their offices to enquire on whether his attendance in Court was required as he had been served with a copy of the mention notice. That on being notified counsel for the Applicant tried in vain to attend Court on the 1/2/18 but arrived late. That the counsels erroneous mistake should not be visited on the client. That the application was made without delay and urged the Court to set aside the dismissal orders so that the matter may be heard on its merits.

2. The application is supported by the supporting affidavit of John Muturi Njoroge Advocate where he deponed that the failure to attend Court was due to administrative error on the part of his office as the matter was erroneously not diarized. That on the same day (1/8/18) on being prompted by the client, he attended Court but arrived late when the matter had been dismissed. That the mistake is highly regretted and urged the Court not to visit the mistake of counsel on his client. That the application is not opposed and therefore the Respondents will not be prejudiced if the matter is heard and determined on its merits. He urged the Court to exercise discretion and set aside the orders and reinstate the suit.

3. The application is not opposed notwithstanding service of the same to the Respondents.

4. The Applicants filed written submissions which I have read and considered.

5. As to whether the applicants were indolent in prosecuting the suit and in filing the application, the Applicants submitted that they have always been ready and willing to prosecute their case. That the Applicants were present in Court on the date the matter was dismissed. Relying on the record he argued that the delay in prosecuting the matter had been delayed by the filing of the survey report which had been ordered by the Court on the 1/12/16 which report was intended to resolve the boundaries of the suit land. That the said report was confirmed to have been filed on the 19/9/17 after which the parties fixed a mention date for pretrial conference.

6. The Applicants placed reliance on the case of **Ivita Vs Kyumbu (1984) KLR 441** where Chesoni J (as he then was) stated that;

> "The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Respondents; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Respondents must however satisfy the Court that he will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the Court is satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

7. In the case of **Allan Vs Sir Alfred MC Alphine & Sons Limited (1968) I ALL ER 543** Salmon L.J stated as follows;

"The Defendants must show:

i. That there had been inordinate delay. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case but it should not be too difficult to recognize inordinate delay when it occurs.

ii. That this inordinate delay is excusable. As a rule, until a credible excuse is made out the natural interference would be that it is inexcusable.

iii. That the Respondents are likely to be seriously prejudiced by the delay. This may be prejudice as the trial of issues between themselves and the Plaintiff or between themselves and the Plaintiff or between each of other or between themselves and third parties. In addition to any interference that may properly be drawn from the delay itself, prejudice can sometime be directly proved. As a rule, the longer the delay the greater the likelihood of prejudice at trial."

8. As to whether the Respondents will be prejudiced, the Applicants submitted that there will be no prejudice that cannot be compensated with costs. They argued that indeed it is the Applicants who stand to be prejudiced if the case is not heard on merits. They urged the Court to be guided by the overriding objectives as stated in section 1A and 1B of the Civil Procedure Act and Article 159(2)(d) of the Constitution to ensure just and disposal of the matters without undue regard to technicalities. That the quest of justice outweighs the convenience that the Respondents might claim. That it is in the best interest of justice and social order that the suit is heard and determined to avert social conflict.

9. The Applicants pleaded with the Court not to shut the door of justice on them. They relied on the case of **Belinda Murai & Others Vs Amos Wainaina (1978)** where Madan J stated as follows;

"the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if in the interests of justice it so dictate. It is known that Courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which Courts of appeal sometimes overrule…"

10. Apaloo JA outlined another approach to a similar question in **Philip Chemwolo & Anor Vs Augustine Kubede (1982-88) KAR 103** as follows;

"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said to exist for the purpose of deciding the rights of the parties and not the purpose of imposing discipline."

11. Order 12 rule 7 of the Civil Procedure Rules provides as follows;

"Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just."

12. The power vested in the trial Court to set aside the order dismissing the suit for non-attendance is contained in the provisions of Order 12 rule 7 of the Civil Procedure Rules. It is a discretionary power that is exercised by the Court judiciously. The exercise of judicial discretion is dependent upon the factual circumstances of each case.

13. In the case **of Mbogo & Another v Shah [1968] EA 93** the Court held that;-

"**….**..the discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice".

14. The reason why the Applicants and his Advocate did not attend Court on the 1/2/18 has been attributed to erroneous mistake in not diarizing the case in chambers. The learned Counsel has explained that on being informed by his client about the date on the same date, he tried to reach Court but arrived late when the matter had been dismissed. I am satisfied that the reasons given by the Applicants are not intended to evade or otherwise obstruct or delay the cause of justice.

15. Though the application is unopposed, the Court is persuaded that the Respondents do not stand to be prejudiced if the application is granted. The Court is minded to uphold the right to be heard as enshrined in Article 48 of the Constitution so that both parties are allowed the opportunity to have their dispute heard and determined on its merits. Guided by Article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act, the Court is inclined to grant the application on the following conditions;

a. The Plaintiff to take steps to fix the matter for hearing within the next 45 days from the date of this ruling.

b. Costs of the application shall be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13TH DECEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

1st & 2nd Plaintiffs/Applicants – Absent

1st & 2nd Defendants/Respondents – Absent

Irene and Njeri, Court Assistants